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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-627

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

HAZEL TUFT, Individually, and Hazel Tuft as a Member of a Class of Female Employees of McDonnell Douglas Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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No. .....

McDONNELL DOUGLAS CORPORATION,
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v.

HAZEL TUFT, Individually, and Hazel Tuft as a Member of a Class of Female Employees of McDonnell Douglas Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

McDonnell Douglas Corporation ("McDonnell"), petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on May 27, 1975.

OPINIONS BELOW

The opinion of the district court is reported at 385 F. Supp. 184 and is reproduced in Appendix A, *infra*. The opinion of the Court of Appeals reversing the district court is reported at 517 F. 2d 1301 and is reprinted in Appendix B, *infra*.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed on May 27, 1975. McDonnell's timely Petition for Rehearing was filed on June 3, 1975 and was denied on July 2, 1975 (see Appendix C, *infra*). On September 26, 1975, Mr. Justice Blackmun entered an order extending the time for filing this petition for certiorari until October 30, 1975. A copy of that order is reproduced in Appendix D, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the EEOC postpone indefinitely the commencement of the mandatory 90-day filing period under Title VII and manipulate the Act so that the charging party has unfettered control over the running of that limitation period?

2. Does the 90-day jurisdictional filing period contained in 42 U.S.C. § 2000e-5(f) begin to run when the charging party is advised that conciliation has failed, or can it be delayed until the charging party has asked for and received from the EEOC a formal "Notice of Right to Sue"?

STATUTES INVOLVED

Section 706(f) of the 1964 Civil Rights Act, as amended (42 U.S.C. § 2000e-5(f)), provides as follows:

> "If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission,

> or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . ."

STATEMENT OF THE CASE

On August 13, 1971, respondent Hazel Tuft filed with the EEOC a sex discrimination charge against McDonnell. After the Commission had made a reasonable cause finding, conciliation efforts were unavailing, and, on February 13, 1974, the EEOC wrote to respondent advising her that conciliation attempts had failed. The letter also stated that "anytime now, you may request your letter of Right to Sue," and suggested that she delay making that request until she obtained a lawyer.

Following her retention of counsel, respondent requested formal suit permission from the EEOC. On June 14, 1974, the Commission sent respondent a second letter advising her that she could institute a civil action in federal court within 90 days of the receipt of that letter.

On June 20, 1974, more than 90 days after her receipt of the notice of failure of conciliation, respondent filed this suit in the United States District Court for the Eastern District of Missouri. The district court sustained McDonnell's motion to dismiss, holding that the 90-day period had commenced upon

plaintiff's receipt of the February 13th letter. The court stated, *l.c.* 186:

> "The only notice required is that which notifies the plaintiff that efforts to conciliate have failed. Once such notice is given, the 90-day period begins to run. . . . While the additional information regarding the right to sue may be of some benefit, it does not change the fact that only notice of failure of conciliation is required to start the statute of limitations running. The letter of February 13, 1974, contained all the notice that is required by the Act to start the ninety-day period running.
>
> "By sending two letters, the EEOC seems to be attempting to circumvent the statute of limitations that Congress put into the Act. If this policy were to be affirmed by the Court, it would effectively eliminate the statute of limitations. . . ."

The Court of Appeals reversed the dismissal, ruling, *inter alia*, that the February 13th letter was insufficient to trigger the 90-day period because (a) the administrative process had not been concluded and (b) the letter did not make specific mention of the mandatory 90-day filing period.

McDonnell's petition for rehearing en banc was denied on July 2, 1975. On September 10, 1975, three other cases presenting the identical "two-letter" issue were argued and submitted to a different panel of the Eighth Circuit.[1] On September 24, the panel set aside that submission and ordered those three cases to be reargued and submitted to the Court en banc

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[1] Those cases are *Harris v. Sherwood Medical Industries, Inc.*, 386 Mo. Supp. 1149 (8th Cir., No. 74-1981); *Whitfield v. Certain-Teed Products*, 389 F. Supp. 274 (8th Cir., No. 75-1077); and *Lacy v. Chrysler Corporation*, — F. Supp. — (8th Cir., No. 74-1949).

on November 12, 1975. McDonnell promptly applied to Mr. Justice Blackmun for an extension of time for petitioning for certiorari, so that it could first seek rehearing of the instant case together with *Harris*, *Whitfield* and *Lacy*. Mr. Justice Blackmun extended the time until October 30. On September 29, McDonnell filed in the Court of Appeals a Motion for Leave to file an out-of-time petition for rehearing en banc. The Court of Appeals denied the motion on October 9. A copy of its order is reproduced in Appendix E, *infra*.

REASONS FOR GRANTING THE WRIT

Perhaps the most revealing characterization of the holding of the Court of Appeals in this case appears in a subsequent ruling by a different panel of the Eighth Circuit in *EEOC v. Meyer Brothers Drug Co.*, — F. 2d —, 10 F.E.P. Cases 1356, 1357 (8th Cir. 1975), where the Court, referring to its own opinion in the instant case, said:

> "That decision rejected the Employer's argument that the EEOC must not be permitted to manipulate the time limits of the Act. . . ."

The opinion below obviously has broad ramifications. Not only does it permit the EEOC and the charging party to "manipulate the time limits of the Act" and thus to delay the filing of a civil action indefinitely, perhaps as much as 10 years, but it does so despite specific statutory language to the contrary. Section 706(f), which the Court was purportedly construing (but which its opinion fails to analyze), is unequivocal:

> "If a charge filed with the Commission . . . is dismissed by the Commission, *or* if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . *or* the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . *shall so notify* the person aggrieved and within ninety days after the giving of *such notice* a civil action may be brought against the respondent named in the charge . . ."[2]

The quoted provision contains three clauses separated by the disjunctive word "or," not by the conjunctive "and." It requires the Commission to notify the charging party of the occurrence

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[2] Emphasis ours here and throughout except where otherwise noted.

of *any* of those circumstances. This conclusion is compelled by the statutory language, as noted by the Second Circuit in *DeMatteis v. Eastman Kodak Company*, 511 F. 2d 306, 310, *modified on rehearing in other respects*, — F. 2d —, 11 F.E.P. Cases 127 (2d Cir. 1975), where, referring to §706(f), the Court stated:

> "There are described therein four sets of circumstances which, *if any one of them occurs*, mandate a notification by the Commission . . . to the person aggrieved; and he . . . may bring a civil action on the charge against the respondent in the appropriate United States District Court 'within ninety days after the giving of *such notice*' by the Commission."

In addition to the very real possibility of an *intra*-circuit conflict which could result from the en banc opinion in the other three cases to be argued in November, the Eighth Circuit's reading of § 706(f) is also irreconcilable with that of the Second Circuit in *DeMatteis*. Likewise, the opinion below is at odds with the Ninth Circuit's decision in *Cleveland v. Douglas Aircraft Company*, 509 F. 2d 1027 (9th Cir. 1975), where it was held that the statutory notice should be issued "when the EEOC has completed its investigation and has failed to achieve voluntary compliance with the employer." The Court held that the issuance of a second letter was without effect and that the statutory period begins to run from the issuance of the first letter.

The only issue presented by this case concerned the effect of the February 13th letter sent by the EEOC to the respondent. The Court of Appeals, however, undertook an expansive discussion of other irrelevant issues, and when it finally approached the controlling question, it completely misstated it as being: "When must the Commission issue an official notice to the aggrieved party in the absence of a demand?" After further extraneous analysis of unbriefed issues, the Court concluded that the 90-day filing period should begin to run upon the termination

of agency action, but effectively authorized the Commission to delay that period indefinitely by the simple expedient of refusing to issue the so-called "statutory notice."

The Court concluded, at 1310, that the February 13th letter could not be construed as a "statutory notice" because the Commission "had not then exhausted its administrative procedures under Title VII." This conclusion is faulty both as a matter of logic and as a matter of law. First of all, the Court acknowledged that *any time* after 180 days, the charging party may request and receive a statutory notice "regardless of whether the Commission procedures remain in the investigative stage, the conciliation stage, or whether the Commission is considering bringing its own action after conciliation efforts have failed." 517 F. 2d at 1308. Hence, by the Court's own reasoning, the validity of a notice is unaffected by the Commission's failure to have completed its processing of the case. But according to the Court of Appeals, even though a notice issued after 180 days *is* effective if requested by the charging party, it is an absolute nullity if issued by the Commission *sua sponte*. The absurdity of that result is self-evident, and the effect is to endow the charging party with unfettered control over the running of the limitations period.

Equally unsupportable is the Court's conclusion that *no* notice can be valid unless it specifically advises the charging party that he or she has 90 days in which to sue. The district court had held that the only notice required by the statute was one which advised the plaintiff that conciliation efforts had failed. That is clearly what the statute says. The Court of Appeals was correct in observing, at 1310, that "the critical phrase in § 706(f) is '*so notify*.' " But it was wrong when it held that the notification must include a reference to the 90-day period. The statute provides in plain English that if any one of three events occur, the Commission "shall *so notify* the person aggrieved." The notice must advise the charging party of the occurrence of one of the

specified contingencies. The statute then immediately goes on to say: "and within 90 days after the giving of *such notice* a civil action may be brought against the respondent named in the charge." Congress did not require the notice to refer in any way to the 90-day period. The Eighth Circuit's contrary conclusion is unfounded and unprecedented.

In addition to its divergence from *DeMatteis* and *Cleveland*, the Court of Appeals' decision is also antithetical to the result reached by the overwhelming majority of district courts which have considered this precise issue, in cases such as *Barfield v. ARC Security, Inc.*, — F. Supp. —, 10 F.E.P. Cases 789 (N.D. Ga. 1975); *Bottoms v. St. Vincent's Hospital, Inc.*, — F. Supp. — (S. D. Ind. 1975); *Pope v. North Hills Passavant Hospital*, — F. Supp. — (W.D. Pa. 1975); *Whittom v. ITT Common Electric Co.*, — F. Supp. — (D. Ariz. 1975); and *Bradshaw v. Zoological Society of San Diego*, — F. Supp. —, 10 F.E.P. Cases 1268 (S.D. Cal. 1975). At least some of these cases are on their way to their appellate courts.

Furthermore, a number of cases decided *after* the ruling below have expressly refused to follow the Eighth Circuit's rationale, terming it either unpersuasive or incorrect. Most startling among these, of course, is the action of another panel of the Eighth Circuit in the *Harris*, *Whitfield* and *Lacy* cases.[3] See also, *Wilson v. Sharon Steel Corp.*, — F.Supp. —, 11 F.E.P. Cases 145 (W.D. Pa., Aug. 15, 1975); *Kelly v. Southern Products*, — F.Supp. — (N.D. Ga., June 16, 1975); *Mungen v. Choctaw, Inc.*, — F.Supp. —, 10 F.E.P. Cases 1345 (W.D. Tenn., June 18, 1975).

The impact of the Eighth Circuit's ruling is indeed far-reaching. The St. Louis EEOC office alone employed the "two-letter"

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[3] The Court of Appeals en banc has requested the parties to these three cases to file supplemental briefs addressing, *inter alia*, "The ramifications and possible limitations of the *Tuft* case."

procedure in more than 200 cases. It was also utilized by various other regional offices, as confirmed by the geographical diversity of the reported cases dealing with the two-letter technique. Significantly, none of the parties in the Court of Appeals actually sought to defend or justify the EEOC's manipulation of the Act. Respondent's primary argument was that any proscription against the two-letter procedure should be applied prospectively only. The Commission itself appeared as *amicus curiae* and assured the Court that the procedure had been abandoned. Now, however, in spite of everyone's at least tacit acknowledgement of the invalidity of the two-letter device, the Court of Appeals has sanctioned it and, in the process, has invited the EEOC to return to its old ways and to further flout the Congressional will. In any event, under the rationale of the Eighth Circuit, a defendant company has no recourse whatever if the EEOC withholds the "Right to Sue" letter for 10 years.

In the case at bar, the Commission's action resulted in extending the potential filing period by more than four months. Delays in other cases have exceeded a year.[4] There is simply no way that the Commission's behavior can be reconciled with the plain dictates of the statute. The jurisdictional prerequisites of the law were not met and, regardless of the attendant hardship, the Congressional intent cannot be disregarded. The philosophy underlying filing limitations of this type was recently noted by this Court in a very similar context in *Johnson v. Railway Express Agency, Inc.*, — U.S. —, 43 U.S.L.W. 4623, 4626 (May 19, 1975):

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are

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[4] The magnitude of the delays caused by the two-letter procedure is detailed in the district court's opinion in *Harris v. Sherwood Medical Industries, Inc., supra* at 1151-52.

outweighed by the interests in prohibiting the prosecution of stale ones."

Since the filing of the panel opinion in this case, the Eighth Circuit has joined many others in ruling that the 90-day filing period is a jurisdictional prerequisite which cannot be waived. *Hinton v. CPC International, Inc.*, — F. 2d —, 10 F.E.P. Cases 1424 (8th Cir., July 17, 1975). Hence, it is irrelevant to the decision of this case whether McDonnell was "prejudiced" by the delay caused by the Commission's manipulation of the statute. *Cleveland v. Douglas Aircraft Company, supra.* But assuming *arguendo* that the question of prejudice to the petitioner has some bearing on the jurisdiction *vel non* of the district court, the inherent prejudice to McDonnell and other employers resulting from the two-letter procedure is readily apparent.[5] During any period of Commission-sponsored delay, potential back-wage liabilities are accruing which, especially in a class action, can reach astronomical proportions. No matter how frivolous the claim, these risks furnish a Title VII plaintiff with what this Court has recently described as "an *in terrorem* increment of the settlement value" of what may well be "vexatious litigation."[6]

The instant case is a classic example. The respondent purports to be suing not only for herself but also on behalf of a class "composed of female employees who have been employed, are now employed or might be employed by defendant . . ." Although this class designation is obviously too general, McDonnell presently employs almost 4,000 women at its St. Louis plant alone, so that the potential back-pay implications of even one week's delay are evident, particularly in light of *Albemarle Paper Co. v. Moody*, — U.S. —, 43 U.S.L.W. 4880 (1975). *Any* delay is necessarily and inevitably productive of prejudice, although

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[6] *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, 43 U.S. L.W. 4707, 4711 (1975).

[5] Footnote 17 to the Court of Appeals' opinion incorrectly states that McDonnell conceded that it suffered no prejudice.

as noted above, the question of prejudice is irrelevant because the clear jurisdictional language of the statute is applicable irrespective of the consequences.

We respectfully submit that the Court of Appeals' opinion in this case embodies a serious misinterpretation of Title VII and represents the most pervasive judicial revision of that statute since the Eighth Circuit's opinion in *Green v. McDonnell Douglas Corporation*, 463 F. 2d 337, *vacated sub nom. McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). In this burgeoning area of the law, where Congress has mandated the prompt disposition of claims, the Court of Appeals has handed to the EEOC and to the charging party a *carte blanche* to thwart the Congressional purpose and to nullify the statutory scheme. The administrative "quagmire" referred to by Congress and by the Court of Appeals (517 F. 2d at 1305) has been filled with quicksand for employers. The Eighth Circuit's radical departure from the letter and the spirit of the law is erroneous, and the predictable consequences of its opinion are disturbing. It should be reviewed by this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Hazel Tuft, Individually, Hazel Tuft, as a Member of a Class of Female employees of McDonnell Douglas Corporation, Plaintiff, vs. McDonnell Douglas Corporation, Defendant.	No. 74-422 C (1).

Memorandum

(Filed November 12, 1974)

This action is before the Court on defendant's motion to dismiss, motion for stay of discovery, and alternative motions to strike. Defendant's motion to dismiss will be granted. The other motions need not be dealt with.

Defendant asserts that this cause must be dismissed because the Court lacks subject matter jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-5(f) (hereinafter referred to as "Title VII" or "the Act"). The basis for this argument is that the suit was not brought within ninety days of the receipt of the statutory notice of failure of conciliation from the Equal Employment Opportunity Commission (hereinafter "EEOC") as required by the Act.

On or about August 13, 1971, plaintiff filed a complaint with the EEOC alleging discrimination on account of her sex. After investigation and conciliation efforts, the EEOC sent plaintiff a letter on February 13, 1974, informing her that conciliation efforts had failed. The pertinent parts of the letter state:

> "This is to inform you that conciliation efforts in your case have failed.
>
> "Anytime now, you may request your letter of Right to Sue. This is done by requesting, in writing, from the District Director, Mr. Eugene P. Keenan.
>
> "When you request your letter of Right to Sue, you have only 90 days to get a lawyer to file suit for you in Federal District Court. It is not wise to request your Right to Sue letter until you have obtained a lawyer who has agreed to represent you."

On the same date, the EEOC sent a letter to defendant stating that conciliation efforts were terminated.

On June 14, 1974, the EEOC sent a second letter to plaintiff entitled "Notice of Right to Sue within 90 Days." The pertinent parts of that letter state:

> "You Are Hereby Notified That:
>
> "Whereas, this Commission has not filed a civil action with respect to your charge as provided by Section 706 (F) (1) of Title VII of the Civil Rights Act of 1964, as amended, 42U.S.C. 2000e *et seq.*: and,
>
> "Whereas, this Commission has not entered into a conciliation agreement to which you are a party;
>
> "Therefore, pursuant to 706 (F) of Title VII, you may, *Within 90 days of your receipt of this Notice*, institute a

civil action in the United States District Court having Jurisdiction over your case.

"Should you decide to commence judicial action, you must do so within 90 days of the receipt of this letter or you will lose your right to sue under Title VII."

On June 20, 1974, plaintiff filed her complaint in this lawsuit.

It is well settled that suit must be brought within ninety days of the receipt of the notice required by Title VII in order for the courts to have subject matter jurisdiction. *Goodman v. City Products Corp.*, 425 F.2d 702, 703 (6th Cir. 1970). The question presented here is, when does that ninety days begin to run? Defendant asserts that the period began with the letter of February 13, 1974, and, therefore, the suit was not timely brought. Plaintiff argues that the period did not start until the receipt of the June 14, 1974, letter and there, therefore the suit was timely.

The pertinent language in the statute reads:

"If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved."

There is no mention in the statute of a "Right to Sue" letter. The only notice required is that which notifies the plaintiff that

efforts to conciliate have failed. Once such notice is given, the ninety day period begins to run. The idea that more information should be put into the notice came not from Congress, but from the EEOC in their regulations. 29 C.F.R. 1601.25. While the additional information regarding the right to sue may be of some benefit, it does not change the fact that only notice of failure of conciliation is required to start the statute of limitations running. The letter of February 13, 1974, contained all the notice that is required by the Act to start the ninety-day period running.

By sending two letters, the EEOC seems to be attempting to circumvent the statute of limitations that Congress put into the Act. If this policy were to be affirmed by the Court, it would effectively eliminate the statute of limitations. A limitation period that may be begun at the request of the plaintiff in his sole discretion, is for all practical purposes, no statute of limitations at all. Such limitation periods are put in statutes by Congress for a purpose, and it would be an intrusion into the legislative function for a court to render it meaningless by affirming an administrative practice that seeks to obviate the clear intent of Congress. The Supreme Court, dealing with the statute of limitations in a statute concerning tax refunds, stated:

> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Rosenman v. United States, 323 U.S. 658, 661. Remedies for resulting inequities are to be provided by Congress, not the courts." *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947)

The wording of the Act clearly indicates that the notice is to be given immediately upon the failure of conciliation. In the case at bar, notice of the failure of conciliation was given at that proper time. The EEOC's attempt to postpone the running of the ninety-day period until the plaintiff requests some further notice is of no effect.

Plaintiff cites cases where the term "Right to Sue Letter" or similar terms were used by the courts. *Local 179, United Textile Workers* v. *Federal Paper Stock Co.*, 461 F.2d 849 (8th Cir. 1972). However, none of those cases involved the two-letter situation involved here and the substance of the notice was not in issue.

Plaintiff also asserts that the rights of private plaintiffs should not be cut off by procedural errors of the EEOC. While there are cases to this effect, they did not deal with a procedure that so clearly goes against the purposes of the Act. *Cunningham* v. *Litton Industries*, 413 F.2d 887 (9th Cir. 1969). Plaintiff also cites a recent case in this district that denied a motion to dismiss on similar facts to the case at bar. *Crosswell* v. *The Pepsi-Cola Bottling Co.*, 74-312 C (3) (E.D. Mo. July 1, 1974). However, the issue of the effect on the statute of limitations by the two-letter procedure was not raised by the parties, and, therefore, not considered by the Court.

It is the conclusion of this Court that the language of the Act is clear and unambiguous as to what notice is required to start the statute of limitations running and that this suit was brought after the time had run out. Therefore, this Court does not have jurisdiction over the subject matter of this suit. Defendant's motion to dismiss will be granted.

Dated this 12th day of November, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX B

Hazel Tuft, Individually, and Hazel Tuft, as a member of a class of female employees of McDonnell-Douglas Corporation, Plaintiff-Appellant,

v.

McDonnell-Douglas Corporation, Defendant-Appellee.

No. 74-1890.

United States Court of Appeals, Eighth Circuit.
Before Clark, Associate Justice, Retired,* and Lay and Bright, Circuit Judges.

[May 27, 1975]

Bright, Circuit Judge.

Hazel Tuft on her own behalf and as a class action alleges that McDonnell Douglas Corporation (McDonnell Douglas) has discriminated against women in its employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Supp. II, 1972). The district court dismissed the action on grounds that Ms. Tuft failed to bring her action in district court within the allowable time period of 90 days[1] after she had received notice from the Equal Em-

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* Tom C. Clark, Associate Justice, Retired, United States Supreme Court, sitting by designation.

[1] Section 706(f) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972)). The pertinent language of that section reads:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or

ployment Opportnity Commission (EEOC or Commission) that it had failed to resolve her claim against McDonnell Douglas through conciliation. Ms. Tuft brings this timely appeal. We reverse the district court for reasons stated below.[2]

I. *Facts*

We relate the relatively uncomplicated facts presented at this stage of the litigation. On August 13, 1971, Ms. Tuft filed a complaint with the EEOC alleging sex discrimination in employment by McDonnell Douglas at its St. Louis, Missouri, facility. Some 17 months later, on December 15, 1972, the EEOC determined that reasonable cause existed to believe that the complaint was true and it commenced conciliation efforts with McDonnell Douglas in an attempt to resolve the dispute. Thereafter, over one year later on February 13, 1974, the supervisor of conciliations at the St. Louis EEOC district office wrote Ms. Tuft advising that conciliation efforts in her case had failed and that she could, if she so desired, request a "right to sue" letter from the district director.[3] The letter further suggested that Ms.

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the expiration of any period of reference under subsection (c) or (d) [state or local agencies] of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.* * * * [Emphasis added.]

[2] The district court opinion is reported at 385 F.Supp. 184 (E.D. Mo. 1974).

We note a similar ruling in another case in the Eastern District of Missouri, Harris v. Sherwood Medical Industries, Inc., 386 F.Supp. 1149 (1974).

[3] As the district court aptly noted, the statute does not mention any "right to sue" letter. 385 F.Supp. at 186. The courts, however, have frequently referred to the statutory notification given by the

Tuft should obtain an attorney before requesting her right to sue letter since she would have only 90 days after receiving it in which to bring suit.[4]

After obtaining a lawyer, Ms. Tuft then requested a formal letter authorizing her to sue in federal court. In response, the district director issued a second letter on June 14, 1974, advising her that the "Commission has not filed a civil action" nor "entered into a conciliation agreement to which you are a party" and that she might institute a civil action in the proper United States District Court "within 90 days of your receipt of this No-

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EEOC which triggers the complainant's right to sue in a Title VII action as a "right to sue" letter. *E. g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); EEOC v. Missouri Pacific R.R., 493 F.2d 71, 75 (8th Cir. 1974); United Textile Workers v. Federal Paper Stock Co., 461 F.2d 849, 850-51 (8th Cir. 1972). The Commission regulation refers to these notifications as "Notices of Right-to-Sue." 29 C.F.R. § 1601.25 (1974).

[4] The text of this letter reads in full as follows:

This is to inform you that conciliation efforts in your case have failed.

Anytime now, you may request your letter of Right to Sue. This is done by requesting, in writing, from the District Director, Mr. Eugene P. Keenan.

When you request your letter of Right to Sue, you have only 90 days to get a lawyer to file suit for you in Federal District Court. It is not wise to request your Right to Sue letter until you have obtained a lawyer who has agreed to represent you.

There are a number of St. Louis area lawyers who have experience with cases under Title VII of the Civil Rights Act of 1964, as amended. You would be wise to talk with a number of lawyers to find out what their fees would be in your case. If you need assistance in obtaining a lawyer or if you have any questions about your legal rights, you may contact Ms. Gretchen Huston, District Office Attorney, at 622-4126.

If there are any questions, please do not hesitate to contact me.

William G. Lorenz /s/
William G. Lorenz
Supervisor of Conciliations

tice."[5] As required by its regulations[6] the Commission forwarded copies of the charge and the reasonable cause determination with this letter.

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[5] This letter was phrased in terms of the statute, which provides, among other things, that if within 180 days from the filing of a case which has not been dismissed by the Commission, or within 180 days from the expiration of reference to state or local agencies, the Commission (or in certain cases the Attorney General) has not filed a civil action or has not entered into a conciliation agreement to which the claimant is a party, the Commission (or the Attorney General) "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * *." 42 U.S.C. § 2000e-5(f)(1).

The text of this letter reads:

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

In Case No. YSL3-203 before the Equal Employment Opportunity Commission, United States Government.

YOU ARE HEREBY NOTIFIED THAT:

WHEREAS, This Commission has not filed a civil action with respect to your charge as provided by Section 706(F)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.; and,

WHEREAS, this Commission has not entered into a conciliation agreement to which you are a party;

THEREFORE, pursuant to 706(F) of Title VII, you may, *within 90 days of your receipt of this Notice*, institute a civil action in the United States District Court having jurisdiction over your case.

Should you decide to commence judicial action, you must do so within 90 days of the receipt of this letter or you will lose your right to sue under Title VII.

If you are not represented by counsel and you are unable to obtain counsel, the Court may, in its discretion, appoint an attorney to represent you.

Should you have any questions concerning your legal rights or have any difficulty filing your case in court, please call Ms. Gretchen Huston of this office at 314-622-5571.

June 14, 1974
Date

John F. Nicholson /s/
John F. Nicholson, Acting
District Director

[6] The pertinent Commission regulation provides:

PROCEDURE AFTER FAILURE OF CONCILIATION

§ 1601.25 Notice to respondent, person filing a charge on behalf of the aggrieved person or aggrieved persons.

Ms. Tuft filed her action on June 20, 1974, only a few days after receiving the second letter from the Commission, but more than 90 days after receiving the initial letter advising her that conciliation efforts in her case had failed.

The district court ruled that the first letter, rather than the second, triggered the running of the 90-day limitation period. The court reasoned as follows:

> • • • The only notice required [by the statute] is that which notifies the plaintiff that efforts to conciliate have failed. Once such notice is given, the ninety day period begins to run. The idea that more information should be put into the notice came not from Congress, but from the EEOC in their regulations. 29 C.F.R. 1601.25. While the additional information regarding the right to sue may be of some benefit, it does not change the fact that only notice of failure of conciliation is required to start the statute of limitations running. The letter of February 13,

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(a) In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred pursuant to § 1601.12 or § 1601.10. Notification to the aggrieved person shall include:

(1) A copy of the charge.

(2) A copy of the Commission's reasonable cause or no reasonable cause determination as appropriate.

(3) Advice concerning his or her rights to proceed in court under Section 709(f)(1) [sic: 706(f)(1)] of Title VII.

(b) The Commission hereby delegates to its District Directors, Deputy District Directors, and the Director [sic] of Compliance, the authority to issue Notices of Right-to-Sue on behalf of the Commission in all cases except those in which a government, governmental agency or political subdivision is named in the charge, pursuant to the procedures set forth in paragraph (a)(2) and (3) of this section.

[29 C.F.R. § 1601.25 (1974).]

1974, contained all the notice that is required by the Act to start the ninety day period running.

* * * * * * *

The wording of the Act clearly indicates that the notice is to be given immediately upon the failure of conciliation. In the case at bar, notice of the failure of conciliation was given at that proper time. The EEOC's attempt to postpone the running of the ninety day period until the plaintiff requests some further notice is of no effect. [385 F. Supp. at 186.]

The district court's analysis cannot be sustained in view of the statutory language of the 1972 amendments to Title VII and the legislative history of these amendments.

II. *Background*

A. *Section 706 Prior to the 1972 Amendments.*

As originally enacted, § 706 of Title VII read in pertinent part as follows:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference [to a state agency] under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought * * * [42 U.S.C. § 2000e-5(e) (1970).]

By this provision, Congress limited the Commission's enforcement powers to conciliation efforts. *See* Alexander v. Gardner-

Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947 (8th Cir. 1974). The courts generally interpreted this provision to require that the Commission notify a complainant whenever conciliation efforts had failed and that this notification constituted a right to sue letter. Stebbins v. Continental Insurance Co., 143 U.S.App.D.C. 121, 442 F.2d 843, 846 (1971); Cunningham v. Litton Industries, 413 F.2d 887, 890-91 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283, 287 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968); *see* EEOC v. Missouri Pacific R.R., 493 F.2d 71, 72 (8th Cir. 1974); Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973); Huston v. General Motors Corp., 477 F.2d 1003, 1005 (8th Cir. 1973); Goodman v. City Products Corp., 425 F.2d 702, 703 (6th Cir. 1970). The issuance of the letter, not the exhaustion of conciliation efforts, constitutes a jurisdictional prerequisite to suit. Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399 (5th Cir. 1969), cert. denied, 403 U.S. 912, 91 S.Ct. 2219, 29 L.Ed.2d 689 (1971).

B. *1972 Amendments and Legislative History.*

In amending Title VII with the Equal Employment Opportunity Act of 1972, Congress expressed concern over the ineffectiveness of conciliation as the sole administrative remedy in Title VII cases and administrative delay in achieving effective enforcement of the Title VII claims. As the House Report observed:

> With the steady growth in the number of cases filed with the Commission, an effective and suitable procedure and remedy become increasingly important. Effective remedies have not resulted from present practice. Of the 35,455 charges that were recommended for investigation, reasonable cause was found in over 63% of the cases, but in less than half of these cases was the Commission able to achieve

> a totally or even partially successful conciliation. [H.R.Rep. No.92-238, 92d Cong., 2d Sess. (1972), 1972 U.S.Code Cong. & Admin.News, pp. 2139-40 (hereafter House Report).]

See S.Rep.No.92-415, 92d Cong., 1st Sess. 5 (1971).

In an attempt to alleviate these problems Congress granted the EEOC the power to initiate civil actions if its conciliation efforts failed[7] but preserved the right of the individual claimant to sue as a means by which he might extricate himself from the "quagmire which occasionally surrounds a case caught in an overloaded administrative process." House Report, 1972 U.S. Code Cong. & Admin.News, p. 2148. As the House Report further observed,

> [i]t would, however, be appropriate for the individual to institute a court action where the delay is occasioned by administrative inefficiencies. The primary concern must be protection of the aggrieved person's *option* to seek a prompt remedy in the best manner available. [*Id.* (emphasis added).][8]

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[7] The House and Senate Reports recommended that the Commission be granted judicially enforceable cease and desist authority. The Congress rejected these recommendations and accepted the minority views in the House Report which recommended that the Commission be empowered to sue directly in federal district court to enforce provisions of Title VII. *See* House Report, 1972 U.S.Code Cong. & Admin.News, pp. 2143-47, 2168-72; S.Rep.No. 92-415, 92d Cong., 1st Sess. 17-22 (1971); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1354 (6th Cir. 1975); EEOC v. Missouri Pacific R.R., 493 F.2d 71 (8th Cir. 1974).

[8] The case before us reflects these administrative delays. Ms. Tuft filed her complaint with the EEOC in August 1971 and more than two and one-half years elapsed before the Commission informed her that conciliation efforts had failed. Delays of this length erode the effectiveness of Title VII. The Commission should endeavor to obtain prompt resolution of Title VII cases through the administrative process and thus avoid burdening the already overburdened federal courts with additional litigation. *See* S.Rep.No.92-415, 92d Cong., 1st Sess. 18 (1971).

Although the individual retains the option of bringing his own Title VII suit when authorized to do so, Congress indicated that the primary burden of enforcing Title VII rights should rest upon the Commission. The Senate Report noted:

> Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission. It is expected that recourse to this remedy will be the exception and not the rule, particularly once the Commission's enforcement procedures are fully operational. In the meantime, however, the committee believes that the aggrieved person should be given an opportunity to escape the administrative process when he feels his claim has not been given adequate attention. [S.Rep.No.92-415, 92d Cong., 1st Sess. 23 (1971).]

C. *180-day Provision.*

An initial question for our consideration is whether § 706(f) *requires* the Commission to complete its enforcement actions by bringing suit within 180 days after the complaint has been filed.[9] An affirmative answer could imply a requirement for the Commission to issue its notice in any event after 180 days from the filing (or expiration of period of reference) date of the complaint. Against the backdrop of legislative history § 706(f) carries a congressional suggestion that the EEOC should dispose of its cases administratively within the 180-day period. Three

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[9] We averted to this issue in EEOC v. Missouri Pacific R.R., 493 F.2d 71, 75-76 (8th Cir. 1974), where we ruled that once a complainant files suit pursuant to a right to sue letter, the Commission may not file its own action. We noted, however, that the issue of whether the Commission, absent a private suit, could sue more than 180 days from the filing of the complaint was not before the court.

courts of appeals, however, have ruled that § 706(f) does not require institution of a Commission suit within the 180-day period. The Sixth Circuit Court of Appeals, in EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir. 1975), ruled that § 706(f) does not bar the EEOC from filing suit more than 180 days after the complaint has been filed. The court explained the purpose of the 180-day provision as follows:

> The statute does not expressly limit the period within which the EEOC may sue to 180 days from the filing of a charge. In one sentence of section 706(f)(1) the EEOC is authorized to sue to enforce Title VII if after thirty days from a charge's filing a conciliation agreement has not been reached. In a later sentence the EEOC is required to notify a charging party when an agreement has not been reached 180 days after the charge's filing, and the private party is then authorized to sue. Authorization for a private suit does not expressly deprive the EEOC of power to sue.
>
> • • • • • • •
>
> If Congress had intended to cut off the Commission's right to sue after 180 days from a charge's administrative filing, it should and would have done so expressly • • •
>
> In summary, we find that the 180-day provision was not intended to hamper the EEOC's ability to enforce Title VII but rather was meant to guarantee private parties prompt recourse to the courts after a reasonable period of conciliation efforts. The EEOC is not barred from basing a complaint on a charge filed more than 180 days prior to the EEOC's suit. [*Id.* at 1356-57, 1359.]

Accord, EEOC v. Louisville & Nashville R.R., 505 F.2d 610, 612 (5th Cir. 1974); EEOC v. Cleveland Mills Co., 502 F.2d 153, 159 (4th Cir. 1974).[10]

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[10] The original enactment of § 706 contained similar language which might imply that the Commission should complete its concilia-

Although Congress believed that six months should be a sufficient period of time in which to process the ordinary case, S. Rep.No.92-415, 92nd Cong., 1st Sess. 24 (1971), its reports, as we have already noted, have acknowledged the existence of great delay in the administrative process. *Id.* at 23; House Report, 1972 U.S.Code Cong. & Admin. News, p. 2147.

Furthermore, in § 706(b), Congress recommended, but did not mandate, that the EEOC make a determination on reasonable cause within 120 days. This provision reads in pertinent part:

> The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, * * * from the date upon which the Commission is authorized to take action with respect to the charge. [42 U.S.C. § 2000e-5(b).]

The use of this language — "as promptly as possible and, so far as practicable" — demonstrates that Congress did not set specific administrative deadlines. Given the congressional emphasis on conciliation,[11] we cannot conclude that Congress intended a 180-day cutoff period for Commission enforcement actions when Congress explicitly noted that determinations on reasonable

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tion efforts within a 30 to 60 day period. *See* text at p. 1305 *supra*. This provision has been interpreted to be precatory only. Cunningham v. Litton Industries, *supra*, 413 F.2d at 890-91; Miller v. International Paper Co., *supra*, 408 F.2d at 287; Choate v. Caterpillar Tractor Co. *supra*, 402 F.2d at 359.

[11] The House sponsor of the bill stated:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement. [118 Cong.Rec. 7563 (1972) (remarks of Congressman Perkins).]

cause alone might take more than 120 days. We believe that the language of the statute and its legislative history support the conclusion that administrative enforcement of Title VII does not cease at the end of 180 days, and thus, the 180-day provision does not serve as a time deadline for the Commission to issue any notice to the complaining party.

D. *Option of Complaining Party After 180 Days.*

Section 706(f) provides that the Commission "shall so notify the person aggrieved" if within 180 days it has neither conciliated the dispute nor brought suit.[12] In its regulations, the Commission has construed this language to require the issuance of the statutory notice on demand of the complaining party after 180 days have elapsed from the filing of the charge.

The Commission regulation provides:

> At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of a charge at any stage of the proceedings, an aggrieved person may demand in writing that a notice issue * * * and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties. [29 C.F.R. § 1601.25b(c) (1974).]

Under this regulation an individual, at any time after the 180-day period has elapsed, may demand the statutory notice as the prerequisite to his suit, regardless of whether the Commission procedures remain in the investigative stage, the conciliа-

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[12] The quoted language appears in the original version of § 706. 42 U.S.C. § 2000e-5(e)(1970). Conciliation in the original version of § 706 was phrased in terms of "voluntary compliance" with Title VII, *see* p. 1305 *supra*, while the present section speaks in terms of "a conciliation agreement to which the person aggrieved is a party." *See* n.1 *supra*.

tion stage, or whether the Commission is considering bringing its own action after conciliation efforts have failed. As the court in EEOC v. Kimberly-Clark Corp., *supra*, 511 F.2d at 1359, observed:

> The 180-day provision's purpose is served under the present law by protecting the private party from undue administrative delay during the conciliation stage, guaranteeing the right of private suit six months after a charge is filed.

See House Report, 1972 U.S.Code Cong. & Admin.News, p. 2148.

The regulation appears consistent with pre-1972 procedures entitling an aggrieved party to demand and receive an official notice or right to sue letter 60 days after the charge was filed regardless of any act or omission of the EEOC. 29 C.F.R. § 1601.25a (1972). In Beverly v. Lone Star Constr. Corp., 437 F.2d 1136 (5th Cir. 1971), the court observed:

> Were this regulation not written, we would read it into the Act lest a claimant's statutory right to sue in federal court become subject to such fortuitous variables as workload, mistakes, or possible lack of diligence of EEOC personnel. [*Id.* at 1140].

III. *The Validity of the Commission's Two-Letter Procedure.*[13]

The question remains—when must the Commission issue an official notice to the aggrieved party in the absence of a demand?

As we observed earlier in this opinion, prior to the 1972 amendments the EEOC's administrative procedures terminated

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[13] We understand from the Commission's amicus brief that the same two-letter procedure has been followed in approximately 200 cases under the jurisdiction of the Commission's St. Louis district office and that the rights of these claimants could be adversely affected by recognizing the first letter as the statutory notice preceding suit under § 706(f).

with the exhaustion of conciliation efforts. The then existing statute recited that if "the Commission has been unable to obtain voluntary compliance * * * the Commission shall so notify the person aggrieved * * *." *See* p. 1305 *supra* for the text of this provision. This notice has been characterized as the "formal notification to the claimant that his administrative remedies with the Commission have been exhausted." Beverly v. Lone Star Lead Constr. Corp., *supra*, 437 F.2d at 1140.

The 1972 amendments, in addition to granting the Commission the power to file civil actions, also gave the Attorney General the power to file an action against a state governmental agency or political subdivision. Except for initial referral requirements to local agencies, the statute prescribes nearly identical procedures for processing Title VII complaints against private employers or governmental employers ("government, governmental agency, or political subdivision") except that the Attorney General must file the suit against the governmental employers. The pertinent portion of § 706(f) applicable to both private and state or local governmental employers is reproduced in the margin.[14]

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[14] In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by Commission, of if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall *so notify* the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * [42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972) (emphasis added).]

This section, read in its entirety, calls upon the Commission, in cases of private employers, or the Attorney General, in cases of Governmental employers, to "notify" the aggrieved party upon a determination not to file suit.

In the absence of a demand from the complainant, the notice from the Attorney General obviously must follow his decision not to file suit. Since the Commission similarly determines whether to institute a civil action against other employers, it follows that it also must issue its notice upon determining that it will not sue. Thus, absent a demand from the aggrieved party, § 706 requires an official notification to the complainant upon making the decision not to file suit, this determination representing the final step of administrative processing.[15] As the Second Circuit observed in DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 310 (2d Cir. 1975),

> [t]he purpose of the notice of right to sue was definitely to fix a time when the administrative remedies had ended and when the 90-day statute of limitations for bringing a suit in the federal court began to run.

This reading of the notification provisions of § 706(f) comports with the expressed congressional desire to place the primary burden of enforcement of Title VII cases on the Commission rather than the private complainant. If the statute required the issuance of notice at some intermediate stage of the administrative process, an aggrieved person would be required to either sue within 90 days or lose his right to sue without knowing whether or not the Commission would file suit on his behalf. Moreover, this construction remains consistent with pre-1972 procedures which generally geared the issuance of notice to ex-

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[15] Elsewhere in Title VII, Congress has been more specific in delineating time requirements for the Commission. When the Commission dismisses a claim for lack of reasonable cause, it must "promptly" notify the complainant and respondent. 42 U.S.C. § 2000e-5(b) (Supp. II, 1972).

haustion of administrative remedies. Before the 1972 amendments administrative procedures ended with the termination of conciliation efforts while under the current statute these administrative procedures end with a determination of whether to file suit.

The notice procedures which trigger the 90-day statute of limitations may be summarized as follows:

1) Upon a dismissal of the charge by the Commission, the statutory notice must issue promptly to the aggrieved party and the respondent. DeMatteis v. Eastman Kodak Co., *supra*, 511 F.2d at 310.

2) The complainant may demand the statutory notice any time after 180 days have elapsed from the filing of the complaint if the Commission has not dismissed his complaint, achieved a conciliation agreement, or filed a civil action.

3) Otherwise, the statutory notice must issue following a determination by the Commission or, in appropriate cases, the Attorney General, that a civil action will not be filed.

Here, the first letter recites only that conciliation efforts have failed and does not mention suit consideration by the Commission. The Commission has advised us that at the time the first letter was sent to Ms. Tuft, it had made no determination on whether to file suit.[16] Thus, the first Commission letter of February 13, 1974, must be read literally, as informing Ms. Tuft that conciliation had failed and advising her that she might request the formal statutory notice from the Commission as a prerequisite to filing her own suit. Since the Commission had not

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[16] In response to the court's inquiry at oral argument, the Commission, as amicus curiae, informed the court, based on supporting documentation, that Ms. Tuft's case was referred to the Commission Litigation Center on February 22, 1974 (subsequent to its first letter to Ms. Tuft) and the file was returned on July 25, 1974 (subsequent to the issuance of the second letter).

then exhausted its administrative procedures under Title VII, no basis exists, legally or equitably, for construing the first letter as a statutory notice initiating the running of the 90-day limitation period.

IV. **Requirement of Actual Notification.**

Finally, even if § 706(f) could be considered to require the issuance of a statutory notice of right to sue upon the failure of conciliation efforts, the letter in the instant case cannot be construed as such notification to Ms. Tuft. This first letter explicitly informed Ms. Tuft that the 90-day period would not begin until receipt of the second letter:

> When you request your letter of right to sue, you have only 90 days to get a lawyer to file suit for you in Federal District Court.

The critical phrase in § 706(f) is "so notify." Notification to the aggrieved person initiates the running of the limitation period. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Plunkett v. Roadway Express, Inc., 504 F.2d 417 (10th Cir. 1974); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974).

The cases make clear that the aggrieved person must receive actual and effective notification of his right to sue. In *Franks*, under the pre-1972 version of the statute, the court ruled that a statutory notice mailed by the Commission and received at claimant's house, but which was never seen by the claimant, did not trigger the 90-day period:

> In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights

> if he allows the thirty-day period to expire in ignorance of his right to sue. [*Id.* at 404.]

The Tenth Circuit, in *Plunkett*, similarly held that it was the actual receipt of the notice, rather than its mailing, which governed the running of the statute. 504 F.2d at 418-19.

Moreover, it is undisputed that Ms. Tuft relied on the Commission's procedures and, in the absence of prejudice to the defendant,[17] she should not be penalized for any errors or omissions of the EEOC. *See* EEOC v. Kimberly-Clark Corp., *supra*, 511 F.2d at 1360; Choate v. Caterpillar Tractor Co., 402 F.2d 357, 360 (7th Cir. 1968); *see also* Love v. Pullman, 404 U.S. 522, 526-27, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); EEOC v. Wah Chang Albany Corp., 499 F.2d 187 (9th Cir. 1974); Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973); Note, Violations by Agencies of Their Own Regulations, 87 Harv.L.Rev. 629, 631 (1974).

Since the first letter did not give Ms. Tuft any effective notification that she could sue within 90 days of the receipt of that letter, it cannot serve to initiate the running of the statute of limitations.

We reverse and remand this case for further proceedings.

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[17] Appellee concedes it has suffered no prejudice by the two-letter procedure.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

74-1890 September Term, 1974

Hazel Tuft, etc.,
Appellant,

vs.

McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 2, 1975

APPENDIX D

Supreme Court of the United States

No. A-273

McDonnell Douglas Corporation

Petitioner

v.

Hazel Tuft, Etc.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 30, 1975.

s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 26th day of September, 1975.

APPENDIX E

United States Court of Appeals
for the Eighth Circuit

74-1890 September Term, 1975

Hazel Tuft, etc.,
Appellant,

vs.

McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

This case comes before the Court on consideration of appellee's motion to file petition for rehearing en banc out of time. The Court has carefully considered the motion and it is now here ordered that appellee's motion for leave to file petition for rehearing en banc out of time be, and it is hereby, denied.

October 9, 1975

DEC 10 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-627

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

HAZEL TUFT, Individually, and Hazel Tuft as a Member of a Class of Female Employees of McDonnell Douglas Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the district court is reported at 385 F.Supp. 184. The opinion of the Court of Appeals reversing the district court is reported at 517 F.2d 1301.

JURISDICTION

The opinion of the Court of Appeals was filed on May 27, 1975. Petitioner filed a petition for rehearing and rehearing en

banc which was denied on July 2, 1975. On September 29, 1975, petitioner filed in the Court of Appeals a Motion for Leave to file an out-of-time petition for rehearing en banc. This was denied on October 9, 1975.

On September 26, 1975, Mr. Justice Blackmun entered an Order extending the time for filing the petition for certiorari until October 30, 1975. On November 3, 1975, Mr. Justice Blackmun entered an Order extending the time for filing a brief in opposition to the petition for certiorari to December 11, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are the questions raised by petitioner of no precedential value since EEOC changed its procedures on March 4, 1975, eliminating the two-letter system?

2. When the charging party filed her suit within 90 days after she received a Notice of Right to Sue from the EEOC, was this timely filed?

3. Can a charging party's claim be barred when she instituted suit within the period recommended by EEOC, the administrative body which had been established to help vindicate rights under 42 U.S.C. 2000e *et seq.*?

4. Is the right to sue letter to the charging party properly issued after both a failure of conciliation and a decision by the EEOC that it will not bring a civil action?

STATUTES INVOLVED

42 U.S.C. § 2000e-5(f), provides as follows:

> "If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission,

> or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . ."

STATEMENT OF THE CASE

On August 13, 1971, respondent, Hazel Tuft, filed a sex discrimination charge against petitioner. On December 15, 1972, the EEOC made a reasonable cause determination of discrimination against petitioner. Thereafter, conciliation efforts were commenced, and on February 13, 1974, a letter was sent to respondent advising her that conciliation efforts had failed, and further advising her that she could request a letter of Right to Sue. The letter further advised her that she had only 90 days to get a lawyer to file suit after request of the right to sue letter, and it is not wise to request the Right to Sue letter until she had obtained a lawyer who has agreed to represent her.

After obtaining a lawyer, respondent requested the Right to Sue letter which was sent to her on June 14, 1974. This second letter advised her that she could institute a civil action within 90 days of receipt of the letter.

The action was filed on June 20, 1974, within 90 days of receipt of the second letter.

The District Court sustained petitioner's Motion to Dismiss holding that the 90 days ran from the receipt of the first letter, and that respondent was barred from bringing her action.

The Court of Appeals reversed, holding that the 90 days ran from the receipt of the second letter, and, therefore, the suit was timely filed.

Petitioner filed for rehearing en banc and this was denied, and later filed for leave to file an out-of-time petition for rehearing en banc in view of the fact that three cases[1] involving the same issue were to be argued en banc by the Court of Appeals. This request was denied.

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[1] *Harris v. Sherwood Medical Industries, Inc.*, 386 F.Supp. 1149 (8th Cir., No. 74-1981); *Whitfield v. Certain-Teed Products*, 389 F.Supp. 274 (8th Cir., No. 75-1077); and *Lacy v. Chrysler Corporation*, — F.Supp. — (8th Cir., No. 74-1949).

REASONS FOR DENYING THE WRIT

I

In cases in which the EEOC has decided not to institute an action it has now eliminated its two-letter system, and now sends out one letter incorporating three items of importance to the charging party: that compliance has failed, that it does not intend to file a civil action and that charging party has 90 days to file a civil action. See CCH LLR, Employment Practices, ¶ 5318.

The Court in *Roberts v. H.W. Ivey Construction Co.*, — F. Supp. —, 11 F.E.P. Cases 697 (N.D. Ga. 1975) stated on p. 698:

> The Court notes that the EEOC has abandoned its practice of sending two letters to complainants regarding failure of conciliation efforts and right to sue. CCH LLR, Employment Practices, ¶ 5318. *Thus the confusion regarding satisfaction of the 90-day requirement will be confined to a limited number of complainants.* (Emphasis supplied.)

Thus, it is obvious that there is no precedential value or public importance to a Supreme Court decision on the two-letter system by reason of the abandonment of the procedures on March 4, 1975.[2]

II

There is no conflict in the Circuits with respect to the result reached in the Eighth Circuit opinion.

There are basically three cases in the Circuits dealing with the issue, they are all in agreement, and they are *Tuft, DeMatteis v. Eastman Kodak Company*, 511 F.2d 306, *judgment modi-*

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[2] See Appendix A for the new Notice of Right to Sue.

fied on rehearing 520 F.2d 409 (2nd Cir. 1975), and *Gates v. Georgia Pacific*, 492 F.2d 292 (9th Cir. 1974).

Tuft holds that the first letter issued to respondent explicitly told her that the 90 days would not run until receipt of the second letter. The Eighth Circuit held that the critical phases in § 706(f) are "so notify" and that "the aggrieved person must receive actual and effective notification of his right to sue."

This Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Alexander v. Gardner-Denver*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) held there then were two prerequisites for the institution of an action:

1. Filing timely charge of employment discrimination.
2. Receiving and acting upon the Commission's Statutory Notice of Right to Sue.

The only letter that clearly notified respondent when suit was to be filed was the second letter, and she filed her suit within this 90-day period.

Petitioner raises the question of EEOC postponement of the commencement of the 90-day filing period and manipulation of the act so that the charging party has unfettered control over the running of the limitations period.

Congress has not limited the period of EEOC investigation and conciliation.

In *Johnson v. Railway Express Agency, Inc.*, — U.S. —, 44 L.Ed.2d 295, 299 (1975) this Court noted the length of time that it took EEOC to investigate, decide and issue its Right to Sue letter.

Petitioner's argument that respondent controls the statute of limitations is specious.[3] This Court is not faced with a ten-year

[3] Congress, in extending the 30-day period for suit to 90 days, was well aware that the claimant might have some trouble in filing a suit in thirty days since counsel had to be obtained, and that counsel had to obtain the facts necessary for the institution of an action.

delay in the request for the "Notice of Right to Sue" as hypothesized by Petitioner. If one counts 90 days from February 13, 1974, the date that conciliation allegedly had failed, then that period expired on or about May 12, 1974. Suit was actually filed on June 20, 1974, about 38 days later. The hypothetical possibilities raised by Petitioner have no reality to the facts this Court must face.

This Court further in *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) gave a flexible interpretation to related timely provisions[4] and stated:

> Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

III

The Eighth Circuit in *Tuft* held that respondent had relied on the Commission's procedures and in the absence of prejudice to petitioner she should not be penalized for errors of the EEOC.

Although petitioner cites *DeMatteis v. Eastman Kodak Company, supra*, it misconstrues the modified opinion for it totally adopts the *Tuft* position of prejudice and states in the modified opinion on p. 411:[5]

> It would be inequitable under such circumstances, and would frustrate the remedial purpose of the Civil Rights Act, to apply the decision of this court so as to bar the claim of a party who filed suit within the period recommended by the administrative body which had been established to help vindicate such statutory rights.

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[4] See *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975).

[5] The Second Circuit made its original decision prospective.

In *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 649 n. 12 (5th Cir. 1974), the Court states clearly that a relying claimant should not be barred from bringing a law suit:

> To the argument that the opposite result might encourage the EEOC to give closer attention to the congressionally mandated time limit for filing complaints, we reply only that punishment of the individual, private grievant seems an unsatisfactory carrot for encouraging the EEOC to put its administrative house in order. If any house cleaning is necessary, sticks applied directly to the EEOC would prove more efficacious, and more just.

IV

42 U.S.C. § 2000e-5(f) provides that after failure of conciliation and *after the Commission has decided not to file a civil action* then EEOC shall notify the person aggrieved of the right to sue.

In this case, the first letter merely said that there was failure of conciliation, there was no mention made of the decision by the EEOC on its decision for suit. Therefore, the 90 days could not run from the date of the first letter. EEOC, after argument, submitted to the Eighth Circuit its control ledger on respondent, Appendix B, which reflects that on February 22, 1974, or 9 days after the letter of failure of conciliation had been written, the matter had been sent to litigation, which clearly reflects that the matter was still being considered for litigation by the EEOC.[6] Since EEOC was still considering litigation, the letter reflecting failure of conciliation could not trigger the limitation period.

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[6] EEOC is not bound to file an action within 180 days after the filing of a charge. See *EEOC v. Kimberly-Clark*, 511 F.2d 1352 (6th Cir. 1975); *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610 (5th Cir. 1974); *EEOC v. Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974); *EEOC v. Meyer Brothers Drug Co.*, 521 F.2d 1364 (8th Cir. 1975).

V

The District Court cases cited by petitioner are basically all decisions that have relied on the decisions of the District Judges of the Eastern District of Missouri.

There are other District Court cases that support respondent here. *Roberts v. H. W. Ivey Construction Co., supra; Taylor v. Pacific Intermountain Express Co.*, 394 F.Supp. 72 (N.D. Ill. 1975); *Doman v. SKF Industries, Inc.*, — F.Supp. —, 11 F.E.P. Cases 359 (E.D. Pa. 1975); *Smith v. General Dynamics Corporation*, — F.Supp. —, 10 F.E.P. Cases 1398 (S.D. Calif. 1975); *Robinson v. Refrigerated Foods, Inc.*, — F.Supp. —, 10 F.E.P. Cases 1237 (D.Col. 1975); *Garneau v. Raytheon Company*, 323 F.Supp. 391 (D.Mass. 1971); *Pullen v. Otis Elevator Co.*, 292 F.Supp. 715 (N.D. Ga. 1968).

CONCLUSION

For the reasons stated the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE NOTICE OF RIGHT TO SUE — APPENDIX A

TO:	FROM:	
EEOC REPRESENTATIVE	CASE CHARGE NUMBER	TELEPHONE NUMBER

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) and accordingly is issuing you this Notice of Right to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission may seek status as intervenor if you decide to sue on your own behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO EITHER NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court or have any questions about your legal rights contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

_____ Date

_____ District Director

cc:

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CASE CONTROL LEDGER

1 LEAD CHARGING PARTY	2 NO OF CHARGES	3 FILING DATE	4 BASIS	5 ISSUE	6 CASE NO
Tuft, Hazel	1	11-1-71	F	LBK	YSL3-203

7 RESPONDENT NO 1 (NAME, ADDRESS & ZIP CODE)	12
McDonnell Douglas Corp. P. O. Box 516 St. Louis, Missouri 63166	

8 PCA	9 SIC	10	11 NO RESP	13 TYPE	14 I.D. NO.	15
	3721		1	E		

16 RESPONDENT NO 2 (NAME, ADDRESS & ZIP CODE)	17 ADDITIONAL RESPONDENTS, ETC Schuetz INVESTIGATOR

18	19 TYPE	19 I.D. NO.	20
TSL2-0037			

21 ← LEAD C.P. CHARGE NUMBER

22 DATE	23 ACTION CODE	EXPLANATION	25	26	27 INITIALS
		Sent to Chicago Litigation Div Charles Clark's Attn 5-21-73			
		Returned assigned to Lorena			
2-13-79	093	Unsuccessful Concil.			
2-22-79	068	Sent to Litigation			PW
6/14/74	089	RIGHT TO SUE ISSUED			SJS
		Fil Returned per EDH Request 7-25-79			
		Fil Sent to Juan Nieves 12-12-79 per EDH			